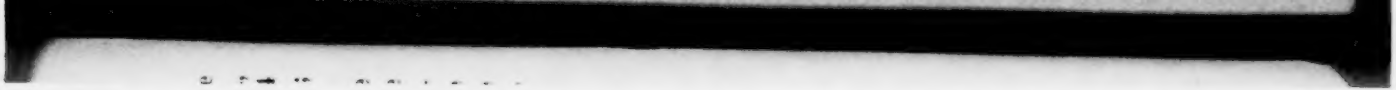

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IN THE

Supreme Court of the United States

No. 265.

TRANSPORTES MARITIMOS DO ESTADO,
Plaintiff-in-Error,

—against—

SYLVIO A. ALMEIDA,
Defendant-in-Error.

BRIEF FOR DEFENDANT-IN-ERROR.

SILAS B. AXTELL,
Attorney for Defendant-in-Error.

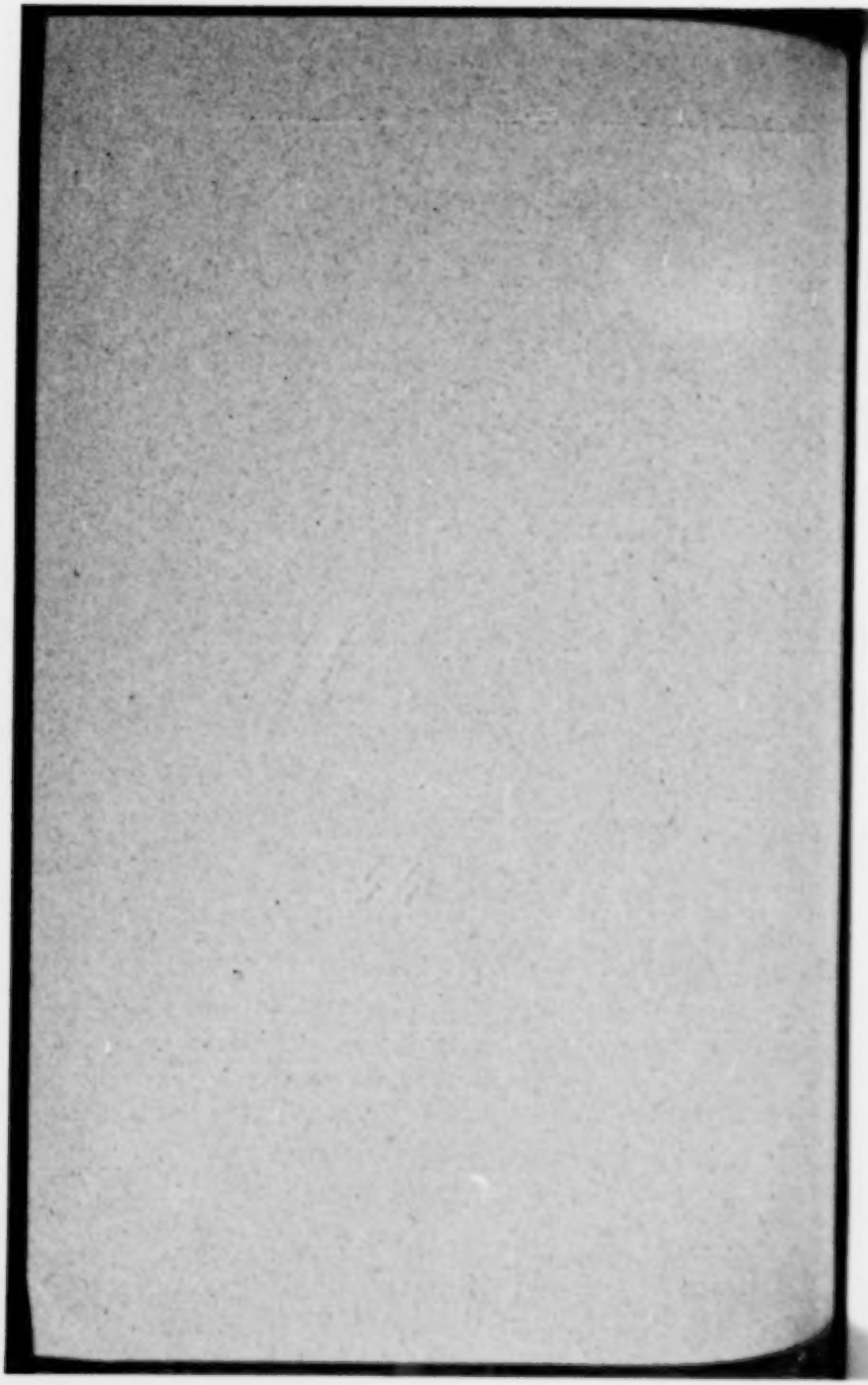

TABLE OF CONTENTS.

PAGE

INTRODUCTION 1

STATEMENT 1

THE NATURE OF THE QUESTION PRESENTED.... 3

I. THERE WAS NO COMPETENT PROOF OF DEFENDANT'S SOVEREIGN STATUS 4

1. The Allegations as to sovereignty in the answer were not competent as proof of sovereignty 5

2. The deposition of Senhor Ribeiro does not afford such proof. Such official is incompetent to prove sovereignty 8

3. The suggestion of the Portuguese Minister could not afford such proof. 13

II. THE COURT OBTAINED AND HELD JURISDICTION OVER THIS DEFENDANT. THE TRANSPORTES DO ESTADO WAIVED ANY IMMUNITY IT MIGHT HAVE POSSESSED 14

III. THE REPUBLIC OF PORTUGAL NEVER PROPERLY OBJECTED TO JURISDICTION, AND WAIVED ANY RIGHT TO CLAIM IMMUNITY WHICH IT MIGHT HAVE HAD 23

THE JUDGMENT OF THE DISTRICT COURT SHOULD BE AFFIRMED 26

Table of Cases Cited.

	PAGE
The Anne, 3 Wheat. 435, 4 L. ed. 428	5, 7
Vol. 12 Am. & Eng. Encyc. of Law	15
Bank of U. S. v. Planters Bank, 9 Wheat. 904, 6 L. ed. 244	17, 21
Beers v. Arkansas, 20 How. 527	17
The Carlo Poma, 255 U. S. 219	7, 17
Clark v. Barnard, 108 U. S. 447	16
Clark v. Barnard, 108 U. S. 436, 27 L. ed. 780	17, 18
Denny v. Pironi, 141 U. S. 121	18
De Simone v. Transportes Maritimos do Estado, 200 N. Y. App. Div. 82	21
The Exchange, 7 Cranch. 116	21
Farrar v. U. S., 3 Pet. 459, 7 L. ed. 741	18
Fitzgerald &c. Co. v. Fitzgerald, 137 U. S. 98.	18
1 Foster on Fed. Practice	19
Gunter v. Atlantic Coast Line R. Co., 200 U. S. 273, 50 L. ed. 477	18
Ex parte Hussein Lufti Beg, 256 U. S. 616	21
Kavanaugh v. Polybank, 205 U. S. 234	17
Matter of Transportes Maritimos do Estado, decided by Supreme Court Feb. 18, 1924	14, 15, 8
Mighell v. Sultan of Johore (1894), 1 Q. B. 160, 63 L. J. Q. B. N. S. 593, 9 Reports 147, 70 L. T. N. S. 64, J. P. 244	17
Ex parte Muir, 254 U. S. 522	7, 4, 25, 17

PAGE

New Jersey v. *N. Y.*, 6 Peters, 323 19

Ex parte New York, 256 U. S. 190, 65 L. ed. 1057 21

Patterson v. *Bark Eudora*, 190 U. S. 160.... 15

The Pesaro, 255 U. S. 216.....7, 10, 20, 24

Porto Rico v. *Ramos*, 232 U. S. 627, 58 L. ed. 763 .....17, 18

The Prins Frederick, 2 Dods R. 451 (Eng.). 21

The St. Jago de Cuba, 9 Wheat. 409..... 20

The Santissima Trinidad, 7 Wheat. 283.... 20

The Sao Vicente, 260 U. S. 151, 67 L. ed. 179 .....5, 8, 6, 25

The Sao Vicente, 281 Fed. 111.....2, 5, 6, 7

The Siren v. *U. S.*, 7 Wall. (74 U. S.) 152, 19 L. ed. 129 29

Smith v. *Reeves*, 178 U. S. 436 .....17, 18

Strathearn S. S. Co. v. *Dillon*, 252 U. S. 348 .....15, 16

Thames & Mersey Ins. Co. v. *U. S.*, 237 U. S. 19 18

Timmons v. *Elyton Land Co.*, 139 U. S. 378. 18

U. S. Revised Statutes, Sec. 4530 16

U. S. v. *Lee*, 106 U. S. 196 17

U. S. v. *Planters Bank*, 9 Wheat. 904, 6 L. ed. 244 17

U. S. v. *Wilder*, 3 Sumn. 308, Fed. Cas. No. 16694 .....20, 21

Works on Jurisdiction 15

Wulfsohn v. *Russian Soviet Government*, 195 N. Y. 472 22

IN THE

Supreme Court of the United States

No. 265.

TRANSPORTES MARITIMOS DO ESTADO,
Plaintiff-in-Error,

—against—

SYLVIO A. ALMEIDA,
Defendant-in-Error.

BRIEF FOR DEFENDANT-IN-ERROR.

Statement.

This case is before this Court, on a writ of error to the United States District Court for the Southern District of New York, for review of a question of jurisdiction.

The action was by a seaman for wages, under the provisions of the Seamen's Act allowing such suits to be brought in the courts of the United States by foreign seamen.

The complaint alleged that the defendant below was a foreign corporation, having an office for the transaction of business in the District, and was the owner and operator of a certain merchant vessel known as the GOA; alleged the making of the contract of employment; the breach thereof; the amount due; and demanded judgment. *The defendant entered a general appearance and*

then filed an answer. In its answer defendant admitted the allegation that the GOA was a merchant vessel and owned and operated by the defendant (Record, p. 4, par. II of Answer), and pleaded to the allegations of fact in the complaint respecting the making and breach of the contract, and the accrual of the cause of action, admitting some of the allegations and denying others upon information and belief. Defendant denied, *upon information and belief*, that the defendant was a foreign corporation; and as an alleged *defense* to the cause of action, alleged affirmatively, *upon information and belief*, that defendant was a department of a foreign sovereign government at peace with the United States, and stated a conclusion that it could not be sued without its consent. The answer was verified by the acting Consul General of Portugal, and his verification contained the statement that that official *was informed and believed* that the defendant was a department of the Republic of Portugal, a sovereign foreign government. The answer was filed the 19th day of November, 1920. On the 16th day of March, 1923, after 2½ years, the Minister Plenipontentiary and Envoy Extraordinary of Portugal to the United States filed in the Court a suggestion that the defendant was a department of the Portuguese Government, and immune to suit against its will by international comity. (Precisely this entire method of procedure has been recently condemned by the United States Supreme Court and by the Circuit Court of Appeals in *The Sao Vicente*, 260 U. S. 151, 67 L. ed. 179, and 281 Fed. 111.)

On the trial the parties stipulated as to the amount due, and defendant urged only the ques-

tion of jurisdiction. The case was by stipulation tried by a jury of one, and at the close of the trial the Court directed a verdict for the plaintiff below for $435 (Record, p. 209), the amount stipulated by the parties, and judgment was entered for that amount on March 13, 1924 (Record, p. 210). This appeal was then taken.

The question of the jurisdiction of the trial Court to give judgment between the parties is the only question requiring determination by this Court.

The Nature of the Question Presented.

The question, simply stated, is whether the Court below justly or illegally exercised jurisdiction over the defendant, Transportes Maritimos do Estado. In certifying this question, the Court below said:

> "I ruled out said defenses on the ground that the defendant had waived its right to so object because of having appeared generally by counsel retained by its Consul General, following the decision of 'Sao Vicente,' 281 Fed. 111, and I gave judgment for plaintiff for the amount stipulated by counsel, and so decided for the reasons set forth in the opinion, to wit, that *by answering generally, the defendant, Transportes Maritimos do Estado had waived any right of immunity which it possessed*" (Record, p. 212).

This ruling presents clearly the main question for review. There is, however, the additional question, if any possible right to claim immunity had not been waived, whether the existence of such right in this defendant was sufficiently

shown in this case to have required the Court's renouncing jurisdiction. In opposing this appeal defendant-in-error submits that there was not in the record any competent proof sufficient to require the trial Court to hold that the defendant, Transportes Maritimos do Estado, was, in fact, a sovereign or a department of a sovereign; that the defendant, Transportes Maritimos do Estado, conclusively waived any immunity which it might have possessed; that the Government of Portugal never properly and legally presented competent objection to the exercise of jurisdiction, and said Government waived any right it might have had to claim immunity.

POINT I.

There was no competent proof of defendant's sovereign status.

The summons, with which the action was begun, was directed to the Transportes Maritimos do Estado, defendant. The complaint, served with the summons, named, in the title of the action, the Transportes Maritimos do Estado as defendant, and alleged that such defendant was a foreign corporation, and had an office for the transaction of business in the State and City of New York, and that said defendant owned and operated the merchant vessel GOA (Record, p. 2). On the complaint, therefore, the Court *prima facie* obtained jurisdiction of such defendant (*Ex parte Muir*, 254 U. S. 522).

The defendant, Transportes Maritimos do Estado, voluntarily recognized the summons,

obeyed it, and filed a general appearance. It also filed an answer, in which it admitted that, as alleged in the complaint, it "had an office for the transaction of business in the City, County and State of New York," and in other respects *denied upon information and belief* "the truth of the allegations in the paragraph marked 'First' of the complaint." Defendant admitted that *it, the Transportes Maritimos do Estado*, owned and operated the steamship GOA, and admitted that such vessel was a merchant vessel (Complaint, par. "Second," Record, p. 2; Answer, par. "II," Record, p. 4). Under paragraph "IX," subdivisions 2 and 7 of the answer, defendant, for a "separate, distinct and complete defense," *alleged on information and belief* that it was a department of a sovereign foreign government.

As a jurisdictional plea, it is clear from *The Sao Vicente*, 281 Fed. 111; *Id.*, 260 U. S. 151, 67 L. ed. 179; *The Anne*, 3 Wheat. 435, 445, 4 L. ed. 428, 430, and the cases hereinafter discussed in Point II hereof, that these allegations were neither proper, competent nor legal. But except upon the jurisdictional question, they had no place in the case.

But, even had the plea been proper as a defense, the record does not sustain appellant's confident assumption that the sovereignty of the defendant, the Transportes Maritimos do Estado, was proven.

I. In the first place, the allegations of defendant's sovereignty in the answer were not con-

clusive, nor even of a character to be respected as proof. This is not a case of an authoritative assertion by the proper foreign diplomatic representative, or our own Executive Department, that the defendant sued is a sovereign. A foreign consul general is not recognized as an official who by his mere statement can bind the Court upon the question of a defendant's sovereign status. (*The Sao Vicente*, 260 U. S. 151, 67 L. ed. 179; *The Anne*, 3 Wheat. 435, 445, 4 L. ed. 428; *The Sao Vicente*, 281 Fed. 111.)

If this defendant could be shown to have sovereign immunity, it would not be because it as an independent entity was a sovereign, but because it occupied such a relation to an independent sovereign that it could partake of that recognized sovereign's immunity. But the immunity of such recognized sovereign was a matter of international comity and courtesy between our Government and it, as a nation, and a right inuring to that foreign government as such, and to be claimed by that government, as a sovereign, through its proper diplomatic representative in negotiation with our Executive Department (*Ex parte Muir, supra*). The defendant, Transportes Maritimos do Estado, as an independent entity, has neither sovereign status nor diplomatic representation, and *prima facie* was not immune to suit. An entity may be a "department" of a government and yet not immune to suit. (*The Sao Vicente, supra.*) Hence, to obtain immunity it must rely upon the foreign government's right thereto, and must, in objecting, cause seasonable objection to jurisdiction and claim of immunity (before the defendant entity submits to jurisdiction) to be

made on behalf of such foreign government and in such foreign government's right by the properly accredited and authorized diplomatic agent of such foreign government. And in claiming immunity through such official, it must be an official, not of the subordinate entity having no independent sovereign status, but of the foreign government whose conceded sovereign status it is claimed relates to the defendant in suit. And it being necessary to show that the entity sued as defendant has such relation to the foreign government as to partake of its sovereign character, the mere representation or allegation of an official to that effect can constitute conclusive, or even proper and competent, proof of such relationship and such sovereignty, *only* when it is either: (1) the representation or allegation of the proper *diplomatic* (as distinguished from *Consular*) official of the foreign country (*The Sao Vicente*, 260 U. S. 151, 67 L. ed. 179; *The Anne*, 3 Wheat. 435, 445, 4 L. ed. 428; *The Sao Vicente*, 281 Fed. 111); which itself is competent and conclusive only if made upon special appearance and plea to the jurisdiction before defendant's submission to suit (*Ex parte Muir*, 254 U. S. 522; *The Pesaro*, 255 U. S. 216); or (2) the certificate, representation or suggestion of the American Executive Department, which alone is responsible for our diplomatic and international relations and competent to advise thereon (*Ex parte Muir, supra; The Pesaro, supra; The Carlo Poma*, 255 U. S. 219).

In addition to his lack of official capacity authoritatively to bind the Court, even by a positive and assured representation as to sover-

eignty, and his being an official whose representation the Court should, for policy's sake, refuse, even on its own motion, to accept or respect either as conclusive proof or as evidence of sovereignty (*The Sao Vicente*, *supra*; *The Anne*, *supra*), it is to be noted that, in the instant case, the Consul General was, himself, obviously in doubt as to the sovereign relationship or sovereign character of this defendant, and did not intend to bind either defendant or the Portuguese Government to such claim, or to rely thereon in suit; for, as pointed out, his allegation was upon information and belief (Record, p. 5), and in his verification thereof he stated, "I am informed and believe." And the sources of his information and grounds of his belief were stated to be records of this defendant kept at its New York office, and communications from *its* agents (Record, p. 6). Identically similar representations, allegations and verification were considered in *The Sao Vicente*, 260 U. S. 151, 67 L. ed. 179, and there held not to constitute *proof of sovereignty* such as a court should or might recognize for the purpose of granting immunity to a defendant entity (this same defendant entity) on the ground of the sovereign immunity of a foreign government with which such defendant claims a relationship.

II. In the second place, the deposition of Senhor Ribeiro, taken in the *Mattos* v. *Transportes Maritimos do Estado* case and admitted herein, does not afford such proof. This "proof," in fact, would fail of conclusiveness or merit on the question of the sovereignty of the defendant, Transportes Maritimos do Estado, for the same

reason as that of the acting Consul General, *i. e.*, it is the testimony of an official not shown to be authorized by the Portuguese Government or any sovereign entity to represent it diplomatically in foreign affairs in the assertion or establishment of its own or its subordinates' sovereign character and prerogatives. The statement of the Director of the Transportes Maritimos do Estado that such institution is a department of the Government of Portugal and shares in the sovereignty of that Government is no more proof to an American court of the possession by this defendant of such relationship and such sovereign character than is the statement of the Consul General. Such Director, even more than the Consul General, "is not considered as a minister or diplomatic agent of his sovereign, entrusted by virtue of his office, with authority to represent him in his negotiations with foreign states, or to vindicate his prerogatives." He is "an incompetent person" to prove such sovereignty either of the foreign government or its subordinate agencies and departments, in the judiciary of a foreign land (*The San Vicente*, 260 U. S. 151, 67 L. ed. 179, 182-183; *Id.* 281 Fed. 111; *The Anne*, 3 Wheat. 435, 445, 4 L. ed. 428f. Hence, the stipulation of counsel allowing such testimony to be admitted to the record for what it might prove cannot accord to it efficacy as establishing something which under no circumstances the representations, statements and testimony of such witness could prove.

At best, such deposition is but the self-serving representation of the present defendant's titular head upon a question as to which his testimony could in no event be either persuasive or even

entitled to the respect or consideration of a court. It is testimony to a fact which American courts must recognize he is utterly incapable and incompetent to prove. Recognition of a capacity and status of sovereignty in casual unknown entities cannot be given on hearsay. Indeed, it is not a function of the judiciary to determine such recognition. That is exclusively a function of our Executive Department (*Ex parte Muir*, 254 U. S. 522; *The Pesaro*, 255 U. S. 216). Where our Executive Department has recognized a foreign entity as a sovereign, the judiciary may, and, indeed, must accept such determination (*Ex parte Muir, supra; The Pesaro, supra*). And our Executive Department having recognized the Republic of Portugal as a sovereign government, the judiciary must, in treating of such Republic's rights, give recognition to its sovereign status. But where a separate foreign entity, sued in an American court as a corporation, seeks to claim the benefit of the immunity accorded by comity to a particular sovereign recognized by our Executive Department, the proof of the relationship of such entity to such recognized sovereign should be proof of the type long recognized and established in international relations (*The Sao Vicente*, 260 U. S. 151, 67 L. ed. 179; *Id.*, 281 Fed. 111; *Ex parte Muir*, 254 U. S. 522; *The Anne*, 3 Wheat. 435, 445, 4 L. ed. 428). It would be manifestly dangerous to the well ordered diplomatic relations of this country with such foreign country, as well as resultingly dangerous to the peace and friendship of such countries, for the judiciary of this country to give the benefit of the immunity, and the honor and respect properly running to such country as a peculiarly distinguished and

individual right, to any casual defendant who might choose to claim on his own behalf a relationship with and the sovereign privileges of such foreign government. Proof of such a sovereign relationship, acceptable to our courts, should be such only as accords to the actual sovereign head of the recognized foreign government the diplomatic courtesy and respect of determining for itself what shall and shall not, and does and does not constitute the bounds and parts of its sovereign self, and such as accords to our Executive Department a free hand in diplomatic affairs. The defendant sued cannot be said *prima facie* to be one of the family of nations recognized by international law and comity as sovereigns; and when it makes the assertion, in its own behalf, that it partakes of the peculiarly precious sovereignty of another recognized entity, the burden of establishing that fact, in a manner fully according to the recognized sovereign due respect of its unlimited right of self-determination, is assumed by such defendant; and under such circumstances this clearly cannot be shown by the mere testimony of such defendant's own officers or its own titular head. This Court may take notice of the fact that in diplomatic intercourse between nations, the most extended formalities are required and practiced in the accrediting by one country to another of its official agents. Yet, the manner in which it is here sought to establish the sovereign relationship of this defendant with a friendly recognized foreign country can only be paralleled by the obviously ridiculous situation of an individual's appearing before our State Department and seeking to establish, merely by his own statement, and without credentials from any proper

known official of a foreign power, that he is the envoy and ambassador of such power and entitled to all the peculiar courtesies extended to such an envoy through respect to the foreign power.

Proof of such a relationship as that here claimed by this defendant as above pointed out, can be properly made to a court in either of two ways only; *i. e.*: (1) by the representation or statement of the recognized sovereign itself properly interposed; or (2) by the certificate of our Executive Department. It is a delicate matter of foreign relations—a matter peculiarly diplomatic, as distinguished from judicial (*Ex parte Muir, supra*). If the proof is to be made by the recognized foreign sovereign on its own behalf, it must be by an agent who is "entrusted by virtue of his office, with authority to represent him [the sovereign] in his negotiations with foreign states, or to vindicate his prerogatives" (*The Sao Vicente, supra; The Anne, supra*), and who has authority officially to claim such sovereign prerogatives on its behalf as well as to attribute to such sovereign all responsibility for the exercise of this, its peculiar privilege, and for the recognition thereof by our courts. The Director of the Transportes Maritimos Do Estado, Senhor Ribeiro, is not a diplomatic official of the Portuguese Government—at least the record does not disclose that he holds credentials as such—and our State Department has not certified him as such. Consequently he could neither represent nor bind such Government in its relations with our own; his person, in our courts, cannot represent officially the person of such Government; his testimony is not, in our courts, the testimony of the Portugaese Govern-

ment. He is entirely without either authority or capacity to advise any branch of this Government, officially, concerning the internal organization of the Portuguese Government, or as to who and what is, or is not, a proper recipient for the high privileges our Government extends to the Portuguese Government.

It follows that, irrespective of stipulations or objections of counsel (which here do not, however, extend to the merit of the "proof" submitted), the mere testimony of this Director could in no event establish the fact of the sovereignty of this defendant, which by the deposition it is sought to prove. And in addition, even if such testimony could be given recognition as establishing that, in fact, the Transportes Maritimos do Estado is a "department" of the Portuguese Government (which clearly it cannot), this, nevertheless, would not, as pointed out in *The Sao Vicente*, *supra*, establish that such "department" partakes, as such, of the sovereignty of such Government, or warrant an American court in assuming that it does. Upon those points Senhor Ribeiro is simply not capable nor competent to say; and the American Judiciary should refuse to be moved by his statements, one way or the other.

III. In the third place, the suggestion by the Portuguese Ambassador herein, made $2\frac{1}{2}$ years after the general appearance and submission to jurisdiction of the defendant Transportes Maritimos do Estado, could not constitute proof of sovereignty for the purpose of this action. Such suggestion at that time had no place in the action.

It is to be noted that this mode of proof does not follow the formal requisites set forth in *Ex parte Muir*, 254 U. S. 522; *The Pesaro*, 255 U. S. 216; and *The Sao Vicente*, 260 U. S. 151; 67 L. ed. 179; since it was not made or transmitted to the Court by our Executive Department on behalf of the Ambassador; nor even made by the Ambassador himself by special appearance before submission of defendant to jurisdiction. The waiver feature is discussed hereafter: as to the defendant, in Point II hereof; as to the Portuguese Government, in Point III. But even aside from the question of the clear waiver, this manner of suggestion cannot, under the cases last cited, and under *Matter of Transportes Maritimos do Estado*, decided by the Supreme Court on February 18, 1924, be held either valid or proper proof, on the Record here presented.

In addition, the Portuguese Government had conclusively waived any right to immunity it possessed (See Point III hereinafter).

POINT II.

The Court obtained and held jurisdiction over this defendant. The Transportes Maritimos do Estado waived any immunity it might have possessed.

We believe that in Point I hereof it has been shown that it was not competently proven to the Court in this action that, in fact, the de-

fendant, Transportes Maritimos do Estado, is itself a sovereign, or partakes of the sovereignty of any known and recognized sovereign entity. But irrespective of whether the proof in the record could justify a finding that defendant, in fact, was sovereign in character, the record shows clearly that jurisdiction of the defendant was properly assumed and held, as against such defendant, the Transportes Maritimos do Estado.

While jurisdiction of the subject matter of a cause of action cannot be conferred upon a court by the consent of parties,

> "It is otherwise as to jurisdiction of the person. If a court has jurisdiction of the subject matter, a party may voluntarily submit himself to such jurisdiction, or may, by failing to object thereto at the proper time, waive his right to contest such jurisdiction."
>
> Works on Jurisdiction, p. 31;
> 12 Am. & Eng. Encyc. of Law, 299.

In the instant case, the subject matter is seaman's wages. The United States courts clearly have jurisdiction of such subject matter of a cause of action between foreign seamen and the foreign vessel owner who transacts business here or sends his vessels into American harbors. And under the Seaman's Act, the courts of the United States have been opened to foreign seamen, and have jurisdiction of foreign seamen's wage suits, as well as jurisdiction to enforce the statutory incidents thereof provided by the Seaman's Act (*Strathearn S. S. Co. v. Dillon*, 252 U. S. 348; *Patterson v. Bark Eudora*, 190

U. S. 169; U. S. Rev. Stat. Sec. 1330). The theory expounded by plaintiff-in-error, therefore, that the suit here reviewed is an attempt illegally to foster on the Court jurisdiction over foreign parties to a foreign contract is not apt. The contract was made within the United States and involved a seaman's employment on a vessel going in and out of American harbors for trade purposes; and in such circumstances, even independent of the fact that the contract must be considered primarily an American contract because made here and calling for part performance here, the seaman is entitled to the benefits of the positive provisions of the statute and the American law governing wages earned in such an employment (*Strathearn S. S. Co.* v. *Dillon*, 252 U. S. 348).

The Court clearly had jurisdiction of the subject matter, therefore, and the instant question of jurisdiction relates to jurisdiction of the person; *i. e.*, whether the Court could and did obtain and properly exercise jurisdiction of the person of the defendant, Transportes Maritimos do Estado. And in this connection it should be noted that many of the cases cited by plaintiff-in-error on the method of raising objection to jurisdiction, relate only to jurisdiction of the subject matter, which cannot be conferred by waiver or consent.

But even in a case of recognized sovereignty, the immunity from suit in foreign courts which is accorded by comity and international law to such sovereign is a mere personal privilege which may be waived (*Clark* v. *Barnard*, 108

U. S. 436, 447, 27 L. ed. 780, 784; *Smith* v. *Reeves*, 178 U. S. 436, 441; *Beers* v. *Arkansas*, 20 How. (U. S.) 527, 529; *Kawananakoa* v. *Polybank*, 205 U. S. 234; *Ex parte Muir*, 254 U. S. 522; *The Pesaro*, 255 U. S. 216; *The Carlo Poma*, 255 U. S. 219; *The Sao Vicente*, 260 U. S. 151, 67 L. ed. 179; *Id.* 281 Fed. 111; *Porto Rico* v. *Ramos*, 232 U. S. 627, 632, 58 L. ed. 763, 765; *Bank of U. S.* v. *Planters Bk.*, 9 Wheat. 904, 6 L. ed. 244; *The Anne*, 3 Wheat. 435, 445, 4 L. ed. 428, 430; *U. S.* v. *Lee*, 106 U. S. 196, 209; *Mighell* v. *Sultan of Johore* (1894), 1 Q. B. 160, 63 L. J. Q. B. N. S. 593, 9 Reports, 447, 70 L. T. N. S. 64, 58 J. P. 244).

> "The immunity from suit belonging to a state * * * is a personal privilege which it may waive at pleasure; so that in a suit, otherwise well brought, in which a state had sufficient interest to entitle it to become a party defendant, its appearance in a court of the United States would be a voluntary submission to its jurisdiction."
>
> *Clark* v. *Barnard*, 108 U. S. 436, 447; *Smith* v. *Reeves*, 178 U. S. 436, 441.
>
> "A state may, if it thinks proper, waive this privilege, and permit itself to be made a defendant in a suit by individuals or by another state."
>
> *Smith* v. *Reeves*, 178 U. S. 436, 440; *Beers* v. *Arkansas*, 20 How. 527, 529.
>
> "The territory, of course, could waive its exemption."
>
> *Kawananakoa* v. *Polybank*, 205 U. S. 349.

The distinction sought to be drawn by plaintiff-in-error between the States of the Union and foreign sovereign states in this respect is not sound. The same rule applies to foreign sovereigns, who when within our country may submit to the jurisdiction of our courts or waive their personal privilege of immunity (*The Sao Vicente*, 260 U. S. 151, 67 L. ed. 179; *Ex parte Muir*, 254 U. S. 522, 65 L. ed. 383, 387; *The Pesaro*, 255 U. S. 216, 65 L. ed. 592; *The Sao Vicente*, 281 Fed. 111; and cases cited).

Where the summons and complaint do not show that the Court cannot possibly obtain jurisdiction, the Court *prima facie* obtains jurisdiction.

> "It is the pleading on the part of the plaintiff that determines whether the Court has jurisdiction or not, and not the defense."
>
> *Works on Jurisdiction*, p. 31;
> *Denny* v. *Pironi*, 141 U. S. 121;
> *Timmons* v. *Elyton Land Co.*, 139 U. S. 378.

And immunity is waived by the filing of a general appearance. (*The Sao Vicente*, 260 U. S. 151, 67 L. ed. 179; *Id.* 281 Fed. 111, 114; *Farrar* v. *U. S.*, 3 Pet. 459, 7 L. ed. 741; *Clark* v. *Barnard*, 108 U. S. 436, 447, 27 L. ed. 780, 784; *Gunter* v. *Atlantic Coast Line R. Co.*, 200 U. S. 273, 50 L. ed. 477; *Porto Rico* v. *Ramos*, 232 U. S. 627, 632, 58 L. ed. 763, 765; *Smith* v. *Reeves*, 178 U. S. 436, 441.)

> "An appearance is the process by which a defendant *submits himself to the juris-*

diction of the court. An appearance is either general or special. *By a general appearance a defendant appears for all purposes in the suit.* By a special appearance he appears solely for the purpose of objecting to the jurisdiction."

1 Foster on Federal Practice, Sec. 168, p. 976.

"The taking of any proceeding other than a special appearance and a motion or plea founded thereon, *is equivalent to a general appearance and a submission of the defendant's person to the jurisdiction of the court.*"

1 Foster on Federal Practice, Sec. 169, p. 977;

New Jersey v. *New York*, 6 Peters, 323;

Fitzgerald &c. Co. v. *Fitzgerald*, 137 U. S. 98;

Thames & Mersey Ins. Co. v. *U. S.*, 237 U. S. 19.

In a case involving this same defendant and the Republic of Portugal, the Circuit Court of Appeals said:

"The immunity of the sovereign, being susceptible of waiver, is lost when the sovereign enters a litigation with a general appearance."

The Sao Vicente, 281 Fed. 111, 114; *see Id.* 260 U. S. 151. Here, the defendant not only entered a general appearance through experienced native counsel retained for that purpose, but pleaded to the facts set forth by plaintiff as the basis for his action, and in every way submitted itself to the Court's jurisdiction. It sub-

mitted to the Court's determination the question of whether the *facts* established the cause of action asserted, and the determination of certain alleged defenses-in-fact to the cause of action. The pleading of *defenses* simply illustrates how completely this defendant submitted to jurisdiction of its person. Even the alleged sovereign relationship of defendant, in so far as it was pleaded, was alleged as a possible defense; and not made the basis of proper objection on special appearance to the assumption by the Court of any jurisdiction over the defendant. But sovereignty of a defendant is not a *defense* to a cause of action in which the sovereign's person is submitted to the Court's jurisdiction, and available agencies and properties are within the jurisdiction, but is a ground only for claiming immunity to such jurisdiction unless the sovereign submits or waives its right. That is, a claim against a sovereign is none the less a valid claim because the debtor is a sovereign, the only distinction between it and a claim against an individual being the right of the sovereign to claim immunity, or submit to suit, in its discretion. (*The Siren* v. *U. S.*, 7 Wall. 152, 74 U. S. 152, 19 L. ed. 129; *U. S.* v. *Wilder*, 3 Sumn. 308, Fed. Cas. 16694; *Santissima Trinidad*, 7 Wheat. (U. S.) 283; *The St. Jago de Cuba*, 9 Wheat. (U. S.) 409; *The Pesaro*, 277 Fed. 473; *Id.* 255 U. S. 216.)

The allegations of the answer were not sufficient to raise the question of jurisdiction, as might be done by a proper objection thereto, or a plea of immunity, upon special appearance. An exactly similar answer and alleged defense,

set up in the manner here involved, were considered in *The Sao Vicente*, 260 U. S. 151, 67 L. ed. 179, *Id.* 281 Fed. 115, and held to be insufficient to raise the question. It was held both that the Consul General was not a competent person to raise the question on a plea of immunity, and that, in addition, the allegations of the answer were insufficient and not proper to raise the question.

It is also to be considered that when a foreign sovereign, or representative or department of such sovereign, enters another country for the purpose of commerce and trade—in competition, indeed, with private citizens of such country—it voluntarily relinquishes, necessarily, some of its sovereign status and immunity, and the agencies it employs enjoy no such immunity. (*U. S. v. Wilder*, 3 Sumn. 308, Fed. Cas. 16694; *The Prins Frederick*, 2 Dods. R. 451 (Eng.); *The Exchange*, 7 Cranch. 116; *Ex parte Hussein Lufti Bey*, 256 U. S. 616; *Bank of U. S. v. Planters Bank*, 9 Wheat. 904, 6 L. ed. 244; *Ex parte New York*, 256 U. S. 490, 65 L. ed. 1057.)

Here, it may be noted that the case of *De Simone v. Transportes Maritimos do Estado*, 200 App. Div. 82, relied on by plaintiff-in-error is neither binding on this Court, nor an authority in point. That was a suit in a State Court under the State Code. The Code itself provided that objection to jurisdiction to the person might be made in spite of a general appearance and in answer to the complaint. But though thus clearly distinguishable from the case at bar, it is also submitted that that case cannot be applied

to a suit in the Federal Courts such as this, where the departments of the Federal Government must work in harmony, and the rule followed which requires such Courts to rely upon the State Department, and diplomatic officials by it duly accredited, for the establishment of the sovereign status of unknown foreign entities, and for the appropriate objections and suggestions to the Court on the question of its exercising jurisdiction over such party.

Wulfsohn v. Russian Soviet Government, 195 N. Y. 472, even if that case should be approved by the Supreme Court, cannot be considered as authority for the principle that Courts may determine the sovereign status of unknown entities, without recognition by the State Department, and the certificate of the State Department as to the same. The Russian people is admittedly sovereign; the Russian Government is admittedly a member of the society of nations. To hold that a New York State Court may not assume jurisdiction over such entity is quite a different thing from holding that a Federal Court must renounce jurisdiction of an entity sued as a corporation, upon a mere informal and improper suggestion to the Court, on the behalf of such entity and by its officials, that it is related to a certain foreign recognized sovereign.

In the present case, there can be no question but that the general appearance interposed was on behalf of the defendant, Transportes Maritimos do Estado, by its officers and agents, with its knowledge and consent, and, not with an idea of appearing specially for the purpose of vindicating an assured right of sovereignty, but

for the purpose of *defending the action*. Under such circumstances the Court clearly obtained jurisdiction over the person of such defendant by its voluntary appearance and consent, and through the waiver of any right of immunity which such defendant might possibly have had.

POINT III.

The Republic of Portugal never properly objected to jurisdiction and waived any right to claim immunity which it might have had.

The nature of the right of immunity accorded by international law and comity has been discussed in Point II hereof, where it has been shown that such right is a personal privilege and may be waived.

In the present case, it cannot be denied that the Portuguese Government had knowledge of the assumption of full jurisdiction over the defendant, Transportes Maritimos do Estado, by the Court, since in all stages of the case its Consul General took an active part in the defense of the case. Yet, though the answer was filed as early as November 19, 1920, the Portuguese Government, on its own behalf, made no move to claim immunity through its diplomatic officials until March 10, 1923, when a suggestion was filed in court by the Ambassador that the defendant was a department of the government of Portugal. During this time full jurisdiction of the defendant had been held. The defendant itself had submitted to that jurisdiction, and actively

appeared in the case as a litigant, waiving fully any claim of immunity it might have had. Costs were run up, expenses incurred, undertakings filed, stipulations entered into. Clearly the Court had jurisdiction.

Certainly, if the Portuguese Government was entitled to claim the defendant as a department of its government, then the acts of the defendant were the acts of such government, and in seeking to assert the relationship for its advantage, such government must also accept the disadvantage caused by such acts, as well. The submission to jurisdiction and the waiver of immunity of defendant operated also as the submission and waiver of such government. And such government, itself, in full knowledge of all these facts, and with its own consular officials involved in the litigation of the case, waived its right of immunity and submitted the defendant to the jurisdiction of the Court by acquiescing in its appearing in such court as a litigant, and by its failure properly to object.

In addition, the objection finally made by the Ambassador was improper and insufficient in form. In *The Pesaro*, 255 U. S. 216, the Supreme Court, discussing a similar situation, said:

> "The suggestion was made directly to the court and not through any official channels of the United States. True, it was accompanied by a certificate of the Secretary of State stating that the Ambassador was the duly accredited diplomatic representative of Italy, but while that established his diplomatic status it gave no sanction to the suggestion. The terms and form of the suggestion show

> that the Ambassador did not intend thereby to put himself or the Italian Government in the attitude of a suitor, but only to present a respectful suggestion and invite the court to give effect to it. He called it a 'suggestion' and we think it was nothing more. In these circumstances the libellant's objection that, to be entertained, the suggestion should come through official channels of the United States was well taken."

And in *Ex parte Muir*, 254 U. S. 522, the Supreme Court said:

> "It was open to that government to make the asserted public status and immunity of the vessel the subject of diplomatic recommendations to the end that, if that claim was recognized by the Executive Department of this Government, it might be set forth and supported in an appropriate suggestion to the court by the Attorney General, or some law officer acting under his direction. * * * The reasons underlying that practice are as applicable and cogent now as in the beginning, and are sufficiently indicated by observing that it makes for better international relations, conforms to diplomatic usage in other matters, accords to the Executive Department the respect rightfully due to it, and tends to promote harmony of action and uniformity of decision."

This rule was again applied in *The Sao Vicente*, 260 U. S. 151, 67 L. ed. 179; and in *Matter of Transportes Maritimos do Estado*, decided by the Supreme Court February 18, 1924.

Hence, the argument of the plaintiff-in-error predicated upon the refusal of the Secretary of State to make a suggestion to the Court in this

case, is not apt. That refusal is no cause for this Court to reverse the rule followed heretofore, but is, on the contrary, good reason for continuing to apply such rule. The entire matter of vindicating sovereign prerogatives is a diplomatic one. And since it is a matter primarily to be determined by the Executive Department, then when it is shown by plaintiff-in-error that the whole facts have been laid before the State Department and it has declined to interfere or make any suggestion on behalf of the Portuguese Government in the matter, that is only more reason for holding that in this case the Judiciary should not, on this improper and tardy application of the foreign Minister, reverse its established rule and give effect to a suggestion which the State Department has refused to recognize, or take action which the State Department has declined to suggest and obviously does not consider appropriate.

The judgment should be affirmed with costs.

Respectfully submitted,

SILAS B. AXTELL,
Attorney for Defendant-in-Error.